BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH WOLTERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 186,353
PROPERTY MANAGEMENT AND MAINTENANCE	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requested Appeals Board review of the Award entered by Administrative Law Judge Robert H. Foerschler dated November 16, 1995. The Appeals Board heard oral argument in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, W. Fredrick Zimmerman of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen A. McManus of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent requested Appeals Board review of the findings and conclusions of the Administrative Law Judge relating to the single issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge awarded claimant permanent partial general disability benefits of 44 percent based on work disability. Respondent appealed the award and argued that claimant was not eligible for a work disability award because he declined respondent's offer of a job within his permanent work restrictions that would have paid claimant his preinjury wage. Conversely, claimant asserted the Administrative Law Judge's 44 percent work disability award was inadequate because the Administrative Law Judge failed to consider work tasks loss evidence presented by the claimant through the testimony of vocational expert, Michael Dreiling, and Drs. Reintjes and Smith. The claimant also argued for a 100 percent wage loss since this is a case which falls under the "new act" work disability definition and the claimant was not working. Therefore, the Administrative Law Judge erred by not averaging the work tasks loss component of the work disability test with a 100 percent wage loss component as required by the statute.

The parties stipulated that claimant injured his low back on October 11, 1993, while working for the respondent. After the injury, respondent voluntarily provided medical treatment primarily with neurosurgeon Stephen L. Reintjes, M.D., in Kansas City, Missouri. Dr. Reintjes diagnosed a L5-S1 herniated disc. He performed a hemilaminectomy and diskectomy at L5-S1 on February 3, 1994. Dr. Reintjes followed claimant until he determined claimant had met maximum medical improvement on August 24, 1994. At that time, Dr. Reintjes opined that claimant's whole body functional impairment from his work related low back injury was 17 percent. Claimant was released to return to work with permanent restrictions of no lifting over 35 pounds occasionally, 20 pounds frequently, avoid performing activities requiring repetitive bending, limited to two hours of standing, walking, or sitting at a time, and limited to one to three hours of truck driving at a time.

Claimant was also examined and evaluated at his attorney's request by James Michael Smith, M.D., an occupational medicine physician in Kansas City, Missouri. Dr. Smith opined claimant had sustained a herniated nucleus pulposus in the lower spine as a result of his injury. The herniated disc had been surgically removed but claimant was left with residual radiculopathy. Dr. Smith placed the following permanent restrictions on claimant's activities: lifting of 35 pounds occasionally; 20 pounds frequently; no repetitive waist bending, pushing, or pulling; limited standing, walking, and sitting to two hours at a time; and limited truck driving to one to three hours at a time.

At the time of claimant's injury, he had been employed by respondent since 1980 or 1981. Claimant started working for the respondent as a roofer and the last four or five years had worked primarily as a crane operator and dump truck driver. Following claimant's injury, he briefly returned to work for respondent but either quit voluntarily or was fired when respondent's owner, Mike Greenamyer, refused to loan claimant $400. While claimant was receiving treatment with Dr. Reintjes and subsequent to being released by Dr. Reintjes, claimant received approximately six months of unemployment benefits. Claimant also received temporary total disability benefits following his surgery. Claimant testified he advised the employment agency he was ready and able to perform gainful employment. However, claimant testified he only contacted employers over the telephone for the sole purpose to obtain employment benefits and not to find gainful employment. Claimant was not working at the time the continued regular hearing was completed on June 8, 1995. In fact, claimant testified he had recently filed for social security benefits and was not making an effort to find employment. For reasons discussed below, we find claimant's entitlement to a work disability award ended April 20, 1995. Otherwise, claimant's entitlement to a work disability would have been terminated effective June 8, 1995, based on his testimony that he was not looking for work and had thereby removed himself from the labor market. Claimant testified he receives an annual income of approximately $10,000 from an inheritance every December and he would receive the last inheritance check in December 1996.

Since claimant's accident is post-July 1, 1993, his eligibility for permanent partial disability benefits will be determined by the "new act" provisions of K.S.A. 44-510e. The "new act" defines permanent partial general disability as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Two vocational experts testified in this case, Michael Dreiling on behalf of the claimant and Gary Weimholt for the respondent. Both vocational experts interviewed the claimant and established a list of work tasks the claimant had performed during the 15 year period preceding the accident. Those work tasks were then compared to claimant's post injury permanent restrictions placed on claimant by Dr. Reintjes and Dr. Smith. During

Dr. Reintjes' and Dr. Smith's depositions, both physicians reviewed those work tasks and testified as to their respective opinions on whether claimant, post injury, could or could not perform each particular work task. The Administrative Law Judge found the evidentiary record as a whole established that the appropriate measure of claimant's permanent partial general disability benefits should be based only on claimant's loss of ability to perform work tasks as developed by Gary Weimholt and verified by Dr. Reintjes in the amount of 44 percent.

The Appeals Board finds the "new act" work disability test requires the work tasks loss be averaged together with "the difference between the average weekly wage the worker was earning at the time of injury and the average weekly wage the worker is earning after the injury." K.S.A. 44-510e. The evidence is clear claimant had not worked or earned a wage since he left the employment of the respondent. Therefore, claimant would have a 100 percent wage loss unless a wage is imputed to the claimant based on the rationale announced in the case of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

The Foulk decision related to the presumption contained in the "old act" that an employee had no work disability if the employee was engaged in any work for wages comparable to the average weekly wage the employee was earning at the time of the injury. *See* K.S.A. 1988 Supp. 44-510e(a). The worker in Foulk refused to attempt a proffered job at a comparable wage that the worker had the ability to perform within her permanent restrictions. The Court of Appeals limited the workers' permanent partial disability benefits to functional impairment. The court held that it would be unreasonable to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage when the job offered was within the worker's ability and the worker refused to even attempt the job. 20 Kan. App. 2d at 284. Accordingly, the court held the no work disability presumption applied and claimant was limited to permanent partial general disability benefits based on her functional impairment.

Although the Foulk case applied to the presumption contained in the "old act", the Appeals Board has applied the rationale to the "new act". *See* Wollenberg v. Marley Cooling Tower Co., Docket No. 184,428 (September 26, 1995). Accordingly, to determine whether the Foulk rationale applies to this case, the primary question is whether the respondent offered claimant a comparable wage job, post-injury, that claimant had the ability to perform and, if so, whether claimant refused such job without just cause. Comparable wage is defined as a wage equal to or within 90 percent of claimant's pre-injury average gross weekly wage. K.S.A. 44-510e(a). As previously noted, the "new act" contains a conclusive rule against work disability and not a "presumption" as contained in the "old act".

Before being released with permanent restrictions to return to work in August 1994, claimant was involved in a nonwork-related automobile accident. Claimant suffered no further injury as a result of such automobile accident but lost his driver's license due to not

having insurance coverage. At the completion of the continued regular hearing held on June 8, 1995, claimant had yet to obtain another driver's license. The only evidence in the record as to the reason claimant had not made an effort to obtain a new license was in the report of vocational rehabilitation expert Gary Weimholt. That report indicated claimant was required to pay $1,500 to an insurance company before his driver's license would be reinstated.

Respondent's owner, Mike Greenamyre, and his office manager, Dale Morrison, both testified in this case. Mr. Greenamyre testified claimant was a good worker and if claimant had a valid driver's license, he could return to work as a truck driver driving a dump truck under 24,000 pounds. If claimant would obtain a commercial driver's license, then claimant could also return to work as a crane operator. Mr. Greenamyre established that he would accommodate the claimant in the job as a crane operator by providing employees to perform the heavy work required in setting up the crane. Claimant would only be required to drive the crane from job to job and then to operate the crane after it was set up. Mr. Morrison testified claimant was offered the crane operator's job in August 1994 when he was released by Dr. Reintjes to return to work with permanent restrictions. However, claimant did not accept the offer as it was conditioned on claimant obtaining a regular driver's license and a commercial driver's license.

Both Dr. Reintjes and Dr. Smith testified the crane operator's job minus the heavy work required to set the crane up for operation was within the claimant's permanent restrictions. Both doctors also testified that claimant was able to drive a dump truck within his permanent restrictions.

The Appeals Board concludes the evidence contained in the record as a whole established that the respondent offered claimant post-injury employment within his permanent restrictions. The employment was conditioned on claimant obtaining a valid driver's license that claimant had lost through no fault of the respondent. Claimant failed to make an effort to obtain a valid driver's license and he did not give any explanation for such failure.

The Appeals Board finds the rationale of Foulk should be applied to this case. The conclusive rule contained in K.S.A. 44-510e(a) should be applied because claimant was offered a job which would have paid 90 percent or more of his preinjury gross average weekly wage. Claimant is therefore limited to permanent partial general disability benefits based on the percentage of functional impairment as stipulated by the parties in the amount of 19 percent. However, the Appeals Board also finds the record is not clear that the respondent made a firm job offer to the claimant within his restrictions until such job offer was made during the evidentiary deposition of respondent's owner Mike Greenamyre on April 20, 1995. Accordingly, the Appeals Board concludes the claimant is eligible for permanent partial general disability benefits based on work disability from the date of claimant's accident, October 11, 1993, through April 20, 1995, the date of Mr. Greenamyre's deposition.

The work tasks the claimant had performed during the 15 years preceding his injury were developed by vocational experts, Gary Weimholt and Michael Dreiling. Mr. Weimholt developed a total of 18 work tasks and Mr. Dreiling developed a total of 10 work tasks. Dr. Reintjes testified claimant had lost the ability to perform 8 of the 18 work tasks developed by Mr. Weimholt and 9 of the 11 work tasks developed by Mr. Dreiling. An additional work task was added to Mr. Dreiling's list during Dr. Reintjes' testimony as Mr. Dreiling had left out the work task of truck driving. Dr. Smith reviewed Mr. Dreiling's work tasks analysis and also testified the claimant had lost his ability to perform 9 out of the 11 work tasks. The Appeals Board finds no reason not to consider both Mr. Dreiling's work tasks analysis and Mr. Weimholt's work tasks analysis equally. Therefore, the Appeals Board finds the claimant has lost 63 percent of his ability to perform work tasks as a result of his injury. The 63 percent work tasks loss is required to be averaged with the claimant's wage loss which in this particular case is 100 percent. The claimant is therefore eligible for work disability benefits in the amount of 81.5 percent from the date of his injury, October 11, 1993, through April 20, 1995. Thereafter, claimant is eligible for permanent partial disability benefits based on the stipulated functional disability in the amount of 19 percent.

All other findings, conclusions, and orders of the Administrative Law Judge are adopted by the Appeals Board as its own that are not inconsistent with this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated November 16, 1995, should be, and is hereby modified and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joseph Wolters, and against the respondent, Property Management & Maintenance, Inc., and its insurance carrier, Continental National American Group, for an accidental injury which occurred October 11, 1993, and based upon an average weekly wage of $400.

Claimant is entitled to 35.86 weeks of temporary total disability compensation at the rate of $266.68 per week or $9,563.14, followed by 43.57 weeks of permanent partial disability compensation at the rate of $266.68 per week or $11,619.25, for a 81.5% permanent partial general disability based on work disability, followed by 31.32 weeks of permanent partial compensation at the rate of $266.68 per week or $8,352.42 for a 19% permanent partial general disability based on functional impairment, making a total award of $29,534.81, which is all due and owing and is ordered paid in one lump sum less any amount previously paid.

Future medical treatment will be considered upon proper application to and approval by the director.

All other orders of the Administrative Law Judge are incorporated and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Frederick Zimmerman, Kansas City, KS
Stephen A. McManus, Kansas City, KS
J. Paul Maurin III, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director